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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-923

ALAN L. STEIN, AS SECRETARY OF THE BUSINESS AND TRANSPORTATION AGENCY OF THE STATE OF CALIFORNIA,

Appellant,

vs.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California corporation, etc., and FEDERAL HOME LOAN BANK BOARD,

Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

APPELLANT'S REPLY TO MOTIONS TO DISMISS OR AFFIRM APPEAL

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In November of 1979, Appellant filed his jurisdictional statement. Amici briefs have been filed in support of that jurisdictional statement by the NAACP Legal and Educational Fund, Inc. and by the Attorneys General of twenty-eight states.

The so-called "Non-Governmental Appellees", representing the federal savings and loan associations, have filed a motion to dismiss or affirm the appeal. The Federal Home Loan Bank Board ("Board") belatedly filed its motion to affirm the appeal. The American Savings and Loan League (which includes many of the same entities that comprise Appellee Conference of Federal Savings and Loan Associations) filed an amicus brief in support of the motions to dismiss or affirm.

Appellant shall briefly respond to some of the points raised by the Appellees in their motions. It is important, however, to recognize at the outset that this case involves only one issue—an issue which Appellant and other states contend is important and has not been addressed heretofore by this Court. That issue is whether state antidiscrimination and antiredlining laws may be applied to federally chartered institutions or whether such application of those laws is preempted by federal statutes. Neither of the Appellees suggests that the issue is unimportant or that it has been decided by this Court. Indeed, the many cases and conflicting congressional debates cited by the parties reinforces Appellant's position that the issue in this case is not only of great significance, but requires resolution by this Court at this time.

I. STATEMENT OF CASE BY NON-GOVERNMENTAL APPELLEES.

The so-called "Non-Governmental Appellees" commenced this action in federal court alleging that the court "has original subject matter jurisdiction of this complaint under 28 U.S.C. Section 1337, inasmuch as this complaint arises under an Act of Congress regulating commerce, i.e., the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. Section 1461, *et seq.* (hereinafter 'HOLA'). . . ." CR at 2.

In their "Notice of Motion and Motion For Entry of Final Judgment," these same appellees asserted, "Plaintiffs have set forth the simple legal issue whose resolution will determine the law applicable to non-discrimination in their lending operations. This matter, while not complex, is of such vital importance—both to the Plaintiff Federal Associations and to the public—that it should be resolved finally and without delay." CR at 130.

In their Notice of Motion and Motion For Partial Summary Judgment on Behalf of Plaintiffs, these same appellees asked the court for a declaratory judgment that the state law

could not be applied "by reason of Article VI, clause 2, of the United States Constitution, and Section 5 of the Home Owners' Loan Act of 1933, as amended. . . ." CR at 90.

The judgment of the court was to grant declaratory relief "on the issue of federal pre-emption." CR at 1139. Both the District Court and the Court of Appeals in this case based their decisions on the doctrine of federal pre-emption. *See* Jurisdictional Statement, Appendix at 2, 11, 22.

For these same appellees now to suggest for the first time that there is an issue of whether under California law, the California statute applies to federally chartered institutions (Motion of Non-Governmental Appellees to Dismiss or Affirm Purported Appeal at 11-12, 26-27) demonstrates a cynical effort to invent nonexistent issues so as to discourage this Court's consideration of the case. The Board made no such contention. Indeed, the Board moves only to affirm—it does not move to dismiss. Moreover, the California Act could not be clearer. It specifically applies to any "financial institution" which is defined as including "any bank, *savings and loan association*, or *other institution* in this state . . . that regularly makes, arranges or purchases loans. . . ." Cal. Health & Safety Code § 35805(c) (emphasis added).

Non-Governmental Appellees refer to a 1974 opinion of the General Counsel of the Board concerning redlining. That opinion suggested redlining was illegal under federal law if it could be shown that discrimination resulted. CR at 310[1]. But

[1] The NAACP Legal Defense and Educational Fund, Inc. disagrees with the assertion by Non-Governmental Appellees (p. 5 of their motion) that "The Board has for many years prohibited 'redlining,' . . . ." *See* Brief Amicus Curiae for the NAACP Legal Defense and Educational Fund, Inc. (filed with the Court of Appeals) at 1-4. The statement of the Amicus American Savings and Loan League in its Amicus brief (p. 4) that California has agreed that the California law does not apply to National Banks is false. The parties simply came to an agreement that the Comptroller would in effect enforce state law. The state expressly reserved its position that its law applied to National Banks. This demonstrates the importance of the case to all financial institutions.

more important, Appellees failed to disclose that in that opinion the General Counsel stated that "Section 528.2(d) (Board anti-discrimination regulation) is based on title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§ 3601 *et seq.*) and certain provisions of the Civil Rights Act of 1966 (42 U.S.C. §§ 1981, 1982) . . . ." There was no mention of the Home Owner's Loan Act ("HOLA"), 12 U.S.C. §§ 1461-1470. Of course, the Civil Rights Act of 1968 expressly permits the states to enact antidiscrimination provisions. 42 U.S.C. §§ 3610, 3615.

Appellees refer to a Board "regulation" (CR at 311) promulgated during this litigation which purports to preempt state law. In fact that regulation is a "resolution" that "does not impose any new obligations". *See* Reply To Amicus Curiae Brief in the Court of Appeals by Appellees, Exhibit E. That resolution does not have the effect of substantive law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 294-309 (1979). The courts below did not rely upon such a resolution but rather interpreted federal law themselves.

Moreover, the 1978 Board regulations were not the basis of the lower court opinions. There is no showing that state law is inconsistent or interferes with those regulations. Rather, the lower courts held that HOLA occupies the field so that state law cannot be applied to federal associations, even though those state laws do not deal with the internal operations of federal associations and are uniform and nondiscriminatory.

II. ERRONEOUS STATEMENTS OF APPELLEE BOARD.

The Board asserts that its regulations list HOLA as the source of its authority to issue regulations. The Board omits to point out that in enacting the regulations, the Board itself stated it was implementing or relying upon ECOA and Title VIII. *See, e.g.*, citations in Motion of Federal Home Loan Bank Board to Affirm; Jurisdictional Statement at 15. Indeed, as noted *supra*, in a Board opinion the Board lists only Title VIII as its source of

authority. If the statutes establishing federal agencies permit those agencies to proscribe redlining, why then does the Congressional history of ECOA suggest that that law was enacted, in part, to deal with redlining? *See* Jurisdictional Statement at 16-17.

The Board stated in its motion that the Court of Appeals "determined that the resulting maze of state, local and federal rules would conflict with the Board's statutory mandate to provide a uniform national standard for the lending practices of federal savings and loan associations. . . ." There is no such statement in the Court of Appeals' opinion. Nor could there be, for no mandate exists for such a uniform standard and no evidence of a maze of state or local rules or of any conflict between state or local law has been presented.

The Board suggests in its motion that Appellant's "principal contention . . . is that the ordinary rule that HOLA preempts all state regulation of federal savings and loan associations is inapplicable in the case . . ." because of ECOA and Title VIII. That statement is, at the very least, misleading. Appellant contends that state laws proscribing discrimination do not constitute the "regulation" of federally chartered institutions any more than do labor laws, equal employment laws, tort laws or real property laws. But if such anti-discrimination laws do constitute a "regulation" of such institutions, nothing in HOLA suggests that the Board has exclusive authority with respect to anti-discrimination.

The Board states in its motion that its exclusive authority concerns "only the credit practices and business affairs of federal associations." Why is lending discrimination a "business affair," but employee discrimination, zoning, liability in connection with projects as to which loans are made, tort liability, wages and hours, loan collection practices and the recording of instruments not? The illogic and resulting confusion of the Board's position is thus manifest.

The Board asserts that in ECOA, Congress gave the Board authority to enforce its requirements. Congress also gave many other agencies such authority. 15 U.S.C. § 1691c. Does that mean that state antiredlining laws do not apply to any entities regulated by any of those agencies (including federally insured, but state chartered, savings and loan associations that are regulated by the Board)? Congress in ECOA also gave the states authority to regulate in the area of anti-discrimination. 15 U.S.C. § 1691d(e)-(g). Indeed, Congress even specified that the states should be involved in anti-discrimination efforts. 42 U.S.C. §§ 3608, 3610, 3616.

Moreover, contrary to the Board's contention, there are provisions in federal law to exempt federal associations from enforcement activities under ECOA if the Board of Governors of the Federal Reserve System is satisfied that there will be "effective enforcement of the state law regarding such creditors." Regulation B of ECOA, Supplement I, at n. 4.

Thus, it is obvious that ECOA provides that federal associations are subject to state laws.

III. THE COURT OF APPEALS DID HOLD A CALIFORNIA STATUTE INVALID AS REQUIRED BY 28 U.S.C. § 1254(2).

Nongovernmental Appellees seek to establish that 28 U.S.C. § 1254(2) does not apply despite clear authority to the contrary. *Minnesota v. Northern States Power Co.,* 405 U.S. 1035 (1972), *aff'g.* 447 F.2d 1143 (8th Cir. 1971); R. Stern & E. Gressman, Supreme Court Practice, 64-65 (5th ed. 1978).[2]

[2] Even if the case is not appropriate for an appeal under 28 U.S.C. § 1254(2) the Court should treat the jurisdictional statement as a petition for certiorari. 28 U.S.C. § 2103 Appellant contends that the matter is properly before this Court as an appeal, but even if reviewed as a writ of certiorari, the issue is deserving of consideration by the Court.

The court of appeals made it clear that it was invalidating a portion of state law by virtue of the preemption doctrine. The court stated, "Appellees argue and the district court held that the state act does not apply to federal savings and loan associations since the field of regulatory control is preempted by federal regulations. . . . It is the regulatory authority of appellant over the federal associations in these respects that is here in dispute. . . . The broad regulatory authority over the federal associations conferred upon the Bank Board by HOLA does wholly pre-empt the field of regulatory control over these associations." Jurisdictional Statement, Appendix at 1-10.[3]

The cases cited by appellees are inapplicable. The parties apparently did not appeal to this Court from the decision in *Rath Packing Co. v. Becker,* 530 F.2d 1295 (9th Cir. 1975), but rather petitioned for certiorari. *See* 425 U.S. 933 (1976). This does not suggest that an appeal could not have been taken.

In citing *Minnesota v. Alexander,* 430 U.S. 977 (1977), Appellees omitted significant portions of the dissenting opinion of Mr. Justice Stevens, with whom Mr. Justice Marshall and Mr. Justice Rehnquist joined. Mr. Justice Stevens stated, "The Court today refuses to review this ruling despite the fact that the case is here on appeal, and may well be within our mandatory jurisdiction." 430 U.S. at 977. In the full footnote, cited in part by Appellees, Mr. Justice Stevens pointed out that the Supreme Court had held that there was appellate jurisdiction to review the question of whether a state taxing statute involved federal governmental immunity from state taxation and that "a similar result should apply to a holding that a state statute invaded the Federal Government's immunity from

[3] *See First Fed. Sav. & Loan v. Greenwald,* 591 F.2d 417, 425 (1st Cir. 1979) which held that a state statute did not apply to federal associations; the court stated "the Supremacy Clause requires the *invalidation of any state law* that either falls within an area exclusively occupied by federal law or actually conflicts irreconcilably with a federal law." (Emphasis added.)

unconsented state regulation." *Id.* at n.1. Here we do not deal with Governmental immunity, but federal preemption of a portion of a state statute—which in effect invalidates a portion of the statute.

It cannot be argued in the instant case that the court of appeals did not make clear its invalidation of the statute as to the federal associations. As noted above, both the district court and the court of appeals expressly ruled that the application of the California Act to the federal associations was preempted, therefore clearly invalidating a portion of a significant state statute.

Moreover, as noted above, there has never been any argument or doubt that the California Act applied to federal associations. It applies to "any bank, *savings and loan association* or *other* [*credit granting*] *institution* in the state. . . ." Cal. Health & Safety Code § 35802(c). (emphasis added) Certainly that definition would include federal savings and loan associations.[4]

IV. THE APPEAL PRESENTS A SUBSTANTIAL QUESTION.

Non-Governmental Appellees' argument seems to be that there are a number of cases in which courts have held that there is preemption. As noted in the Jurisdictional Statement, there

[4] Appellees' reference to the Financial Code is misplaced. Under the California Financial Code, the state regulates state savings and loan associations. The Financial Code provides to federal associations "all rights, powers, and privileges, and . . . exemptions and immunities" granted state associations. Cal. Fin. Code § 14000. Here we deal with the California Health and Safety Code which concerns discrimination and other nonfinancial regulations. Indeed, in California state appellate courts the issue of federal preemption of state laws applicable to financial institutions had either never been raised, *see Garrett v. Coast & Southern Fed. Sav. & Loan Ass'n,* 9 Cal. 3d 731, 108 Cal. Rptr. 845; 511 P.2d 1197 (1973), or had been decided adversely to the federal associations, *Larwood v. San Diego Fed. Sav. & Loan Ass'n,* 185 Cal. App. 2d 450, 8 Cal. Rptr. 362 (1960).

are many cases in which state law has been applied to federally chartered savings and loan associations. [5]

As the Oregon Supreme Court stated in a preemption case, "One point that may 'excuse' the apparent confusion and inconsistency in the cases in [*sic*] that the particular circumstances of each case are of compelling importance in reaching a decision." *Derenco, Inc. v. Benj. Franklin Fed. Sav. & Loan Ass'n,* 281 Or. 533, 577 P.2d 477, 483 (1978). That court derided the oft-cited language of *People v. Coast Federal Sav. & Loan Ass'n,* 98 F.Supp. 311, 316 (S.D. Cal. 1951), that Board regulations concern all aspects of federal association "from its cradle to its corporate grave" by stating it "only proves it pays to turn a phrase." 577 P.2d at 485.

In the instant case, the State has dealt with discrimination by applying its law to all financial institutions doing business in California. Federal statutes explicitly permit the state laws in the area. On the basis of the facts and laws in this case, there should be no preemption.

Appellees contend that the non-preemption provisions in federal civil rights statutes only apply to the application of those statutes and do not manifest non-preemption by other laws such as HOLA. This contention is erroneous.

[5] In addition to the cases cited in the Jurisdictional Statement see also *Johnson v. First Fed. Sav. & Loan Ass'n,* 418 F.Supp. 1106, 1109 (E.D. Mich. 1976) (expressed doubt about preemption). There are many cases in which state law has been applied to federal association even though the issue of preemption was never raised. *E.g., Patton v. First Fed. Sav. & Loan Ass'n,* 118 Ariz. 473, 578 P.2d 152 (1978); *Nichols v. Ann Arbor Fed. Sav. & Loan Ass'n,* 73 Mich. App. 163, 250 N.W. 2d 804 (1977); *Continental Fed. Sav. & Loan Ass'n v. Fetter,* 564 P.2d 1013 (Okla. 1977); *First Southern Fed. Sav. & Loan Ass'n v. Britton,* 345 So. 2d 300 (Ala. App. 1977); *Bellingham First Fed. Sav. & Loan Ass'n v. Garrison,* 87 Wash. 2d 437, 553 P.2d 1090 (1976); *Mutual Fed. Sav. & Loan Ass'n v. American Medical Services, Inc.,* 66 Wis. 2d 210, 223 N.W. 2d 921 (1974); *Tucker v. Pulaski Fed. Sav. & Loan Ass'n,* 252 Ark. 849, 481 S.W. 2d 725 (1972).

First, by using non-preemption language in ECOA and the 1968 Civil Rights Act, Congress suggested that state civil rights legislation not inconsistent with federal law would apply. The legislative history set forth in the jurisdictional statement supports Appellant's contention in this regard. The Board's assertion that Congress' failure to enact some non-preemption language in 1974 overlooks the fact that the 1968 Civil Rights Act already precluded preemption with respect to discrimination in lending and that ECOA non-preemption language was added in 1976. 15 U.S.C. § 1691d(f)-(g).

Second, it is uncontradicted that Board antiredlining regulations derive legislative sanction from these civil rights statutes. Appellees contend that listed among the authorizing statutes is HOLA—a statute which does not contain one word about antidiscrimination. But they cannot dispute that the Board derives at least part (if not all) of its authority to enact antiredlining regulations from civil rights statutes that expressly permit state antidiscrimination and antiredlining laws to apply.[6]

Appellees' reliance on *First Federal Sav. & Loan Tax Comm'n,* 437 U.S. 255 (1978), is misplaced. In that case the Court held that a Massachusetts tax could be applied to a federally chartered savings and loan because the state law "was not unfriendly or discriminatory. It applies a single neutral standard to state and federal institutions alike." *Id.* at 258. The same is true of the state law in the instant case.

Non-Governmental Appellees refer to the amici brief of the State of Washington and other Attorneys General as contending that federal laws are unconstitutional. Amici contended that the Court should hold that Congress did not intend preemption, for if there is such preemption there would

[6] This is unlike *First Federal Sav. & Loan Ass'n v. Greenwald,* 591 F.2d 417, 426 (1st Cir. 1979), in which the federal regulations in question were promulgated by the Board pursuant *only* to HOLA and not pursuant to any other statute.

be, according to amici, constitutional issues regarding federalism. In *Hopkins Federal Sav. & Loan Ass'n Cleary,* 296 U.S. 315 (1935), cited by the Board, the Supreme Court found that federal standards for conversion of existing state-chartered institutions were unconstitutional *per se* as an "encroachment upon the reserved powers of the states." 296 U.S. at 335.

V. CONCLUSION.

Appellant has not attempted to rebut all of the point raised by Appellees. The filings demonstrate controversy over a significant legal issue.

Appellant urges the Court to note probable jurisdiction so that the issue may be fully briefed and resolved.

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